

IN THE MATTER OF	:	BEFORE THE
T-MOBILE	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 08-035C

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DECISION AND ORDER

On September 29, 2008, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of T-Mobile for conditional use approval of a Commercial Communications Tower and Commercial Antennas, specifically a new flagpole style monopole and fenced equipment compound in an R-A-15 (Residential: Apartments) Zoning District, filed pursuant to Section 131.B of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Sean Hughes, Esquire, represented the Petitioner. Carmen Charalambous, Camille Shabshab, and Rajkanwar Brar testified in favor of the petition. No one appeared in opposition to the petition.

The Petitioner introduced the exhibits as follows into evidence.

1. Resume of Camille Shabshab, engineer
2. Conditional Use Plan dated 4-22-08
3. Seven photographs modified to show existing locations of area telecommunications poles/antennas/facilities. Distances of area telecommunication facilities from the proposed facility
4. Photograph of posted public hearing notice

5. Copy of affidavit of posting
6. Advertising Certifications
7. BAN109 coverage – location of existing towers
8. Resume of Rajkanwar Brar
9. Current on-air coverage map
10. BAN109B@120 feet map

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The 18.89-acre, irregularly shaped subject property is located in the 2nd Election District on the west side of Wheaton Way and about 1,230 feet southwest of the Wheaton Way intersection with US 40. It is referenced on Tax Map 18, Grid 19, as Parcel 361, Part of Lot A-1 (the "Property").

2. The Property lies within the large Charleston Manor apartment community, complex comprising multiple apartment buildings, parking lots, and various community facilities dispersed over a hilly area. In the community's central area is a prominent hill, the location of an apartment building, parking lot, and a level lawn area enclosed by a low fence and currently used as a pet park. The petitioner proposes to develop this lawn area as the conditional use ("the Site").

3. Vicinal Properties. To the Site's northwest and down a steep slope are a parking lot and several apartment buildings. To the east are an apartment building and parking lots. About 275 feet to the south, down another steep slope and across Normandy Woods Drive, are a community swimming pool and bathhouse, a tennis court, and a small parking lot. The closest uses beyond the Charleston Manor community lie more than 600 feet to the northeast.

4. Roads. The Site is adjacent to a parking lot/drive aisle, which runs to the southwest from Wheaton Way. As the Technical Staff Report ("TSR") notes, roads, posted speed limits, and sight distances are inapplicable to this petition.

5. The Property is served by public water and sewer.

6. Policies Map 2000-2020 of the 2000 General Plan designates the Property as "Residential Areas." The General Plan Transportation Map depicts Wheaton Way as a Local Road.

7. The Petitioner is proposing to construct and operate a new commercial telecommunications monopole facility on the Site and about 96 feet from the apartment building at 3220 Wheaton Way. An eight-foot high white PVC fence would enclose the 2,500-square foot Site. Within the enclosed area, the Petitioner proposes to construct a 120-foot flag/monopole¹, associated equipment, and electrical components. Space is provided on the monopole and the ground (three areas) for future carriers. The existing gravel walkway will provide access to the facility. The facility will operate continuously and unattended, with infrequent service visits. The monopole appears to be set back about 57 feet from the closest property line.

8. Referring to Petitioner's Exhibit 2, Mr. Shabshab testified that the Site, which has limited access, would accommodate future carriers. The antennas will be concealed within the shaft of the pole. Additional landscaping will be provided, as shown on the Conditional Use Plan. Referring to Petitioner's Exhibit 4, he explained the red dots show the location of area telecommunications towers/antennas. The photographs simulate the presence of the proposed monopole in the landscape.

¹ Although the conditional use plan states the monopole will be 125 feet, other exhibits indicate it will be only 120 feet. Mr. Hughes also clarified that the monopole will be 120 feet in height.

9. Carmen Charalambous testified to being a T-Mobile zoning manager. She stated that T-Mobile lacks sufficient coverage in the area. Referring to Exhibit 7, she explained that T-Mobile is already on three towers and that Howard County does not permit private/commercial uses on its tower. She stated there are no water tanks in the area and other towers did not meet T-Mobile's coverage objectives because of height or blockage. One cell tower owner would not permit T-Mobile to run tests. In her opinion, the proposed use would have no adverse impact. Service technicians inspect the site in an SUV every few months. No significant outdoor lighting is proposed (such as light directed toward the flag.) She also agreed to a change in the flagpole's proposed color, white, if DPZ desired another color.

10. Rajkanwar Brar testified to T-Mobile's need for the tower based on area topography, which impedes indoor residential coverage, in-vehicle coverage and on-street coverage. Exhibit 9 demonstrates the lack of reliable indoor coverage. Exhibit 10 demonstrates the improvement of indoor coverage with the proposed facility. He also stated the presence of the facility would facilitate E911 emergency calls because E911 operators can now triangulate the location of a caller within about 120 feet. The flagpole will be 120 feet in height. T-Mobile's antennas will take the top two slots, with three additional available antenna locations every ten feet down. In response to questioning about collocation, he stated that the topography prevents other facilities from reaching the area of the proposed site, as do other carriers. The height is designed to clear trees and maximize the service area, which will solve current call drop-off problems.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

I. General Criteria for Conditional Uses (Section 131.B)

A. Harmony with the General Plan. Section 131.B.1 requires me to evaluate the proposed conditional use's harmony with the land uses and policies indicated in the Howard County General Plan for the R-20 zone. In evaluating a plan under this standard, I must consider (a) the nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and (b) if a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

In this case, the Petitioner is proposing a low intensity, passive utility occupying a small portion of the Property. It would make infrequent use of the existing parking lot and access the Site from the Wheaton Way drive aisle, which has low traffic volume. The use would be combined with the permitted apartment use. For these reasons, I conclude the overall nature and intensity of the use on the site is appropriate, given the adequacy of proposed buffers and setbacks.

B. Adverse Impacts. Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

When assessing a proposed conditional use under these criteria, we must begin with the realization that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have

adverse effects in an R-A-15 district. The proper question is whether those adverse effects are greater at the proposed site than they would be generally elsewhere within the R-A-15 district. *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, the Petitioner has met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with the expansion of a religious facility in the R-A-15 district.

a. Physical Conditions. The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

The testimony and evidence indicate the proposed facility will not generate inordinate noise, significant outdoor lighting, or other physical effects detectable within the neighborhood. Consequently, I conclude the Petitioner has adequately shown that noise, lighting, or other physical conditions generated by the proposed use will not be greater than that which is ordinarily associated with a telecommunication tower and facility in the district.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

Based on the evidence, I conclude the Petitioner has met its burden of demonstrating the proposed use complies with Section 131.B.2.b. The record indicates the Petitioner will modify the existing fencing and is amenable to consulting with DPZ on the appropriate color for the

monopole. The monopole itself will be about 57 feet from an internal property line and is not subject to any setback requirements imposed by the Supplemental Regulations. It will be sited some distance from the 20-foot use setback. It will be buffered from the apartment building to the east by the fence and landscaping (as shown on the Conditional Use Plan). The area's topography and existing vegetation will also buffer it from all other areas in Charleston Manor.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The existing adjacent parking lot, which is properly located and screened, is large enough to accommodate the infrequent visits of service technicians.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

This section does not apply.

II. Specific Criteria for Communications Towers or Antennas (Commercial) (Section

131.N.14)

A. Section 131.N.14.b

(1) An applicant for a new communication tower shall demonstrate that a diligent effort has been made to locate the proposed communication facilities on a government structure or, on an existing structure or within a non-residential zoning district, and that due to valid considerations, including physical constraints, and economic or technological feasibility, no appropriate location is available. The information submitted by the applicant shall include a map of the area to be served by the tower, its relationship to other antenna sites in the petitioner's network, and an evaluation of existing buildings taller than 50 feet, communication towers and water tanks within one-half mile of the proposed tower.

In this case, the testimony and evidence indicate that the Petitioner has sought to locate the proposed facilities on several area towers, but their lower height would not solve the coverage problem in the area of the proposed monopole and facility owing to its topography and vegetation. The sole governmental facility in the area does not permit commercial users. There are no water tanks within one-half mile of the Site.

(2) New communication towers shall be designed to accommodate antennas for more than one user, unless the applicant demonstrates why such design is not feasible for economic, technical or physical reasons. Unless collocation has been demonstrated to be infeasible, the conditional use plan shall delineate an area near the base of the tower to be used for the placement of additional equipment buildings for other users.

The proposed monopole is designed to accommodate three additional telecommunications carriers and related ground equipment.

(3) Ground level equipment and buildings and the tower base shall be screened from public streets and residentially-zoned properties.

A high fence and landscaping will screen the equipment and buildings.

(4) Communication towers shall be grey or a similar color that minimizes visibility, unless a different color is required by the Federal Communications Commission or the Federal Aviation Administration.

According to the testimony and evidence, the monopole is white, but the Petitioner has agreed to work with DPZ on the appropriate color.

(5) No signals or lights shall be permitted on a tower unless required by the Federal Communications Commission or the Federal Aviation Administration.

No additional signals or lights are proposed.

ORDER

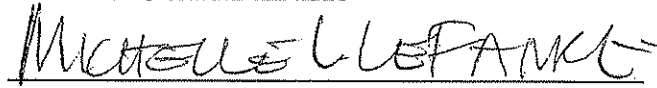
Based upon the foregoing, it is this **15th day of October 2008**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petition of T-Mobile for a 120-foot high, flagpole- style monopole and 2,500 square foot fenced equipment compound, in an R-A-15 (Residential: Apartments) Zoning District is **GRANTED;**

Provided however, that;

1. The Petitioner shall consult with DPZ concerning the monopole's proposed color.
2. **No additional lighting is permitted other than that required by the Federal Communications Commission or the Federal Aviation Administration.**
3. **If no longer used, the communication tower shall be removed from the site within one year of the date the use ceases.**

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFaivre

Date Mailed: 10/16/08

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.